BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES L. WEST	)	
Claimant	)	
	)	
VS.	)	
	)	
SELF'S, INC.	)	
Respondent	)	Docket No. 1,031,706
	)	
AND	)	
	)	
PEERLESS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the January 31, 2007, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

Claimant alleges he suffered repetitive injuries to his "neck, mid and low back, bilateral knees and all other body parts affected" "[e]ach and every work day through [his] last day of work of September 13, 2006."[1] The Administrative Law Judge (ALJ) found that claimant had established he sustained injuries as a result of repetitive work activities that continued up to the last day he worked for respondent on September 13, 2006. The ALJ further found that timely notice was provided by claimant pursuant to K.S.A. 44-520. Accordingly, respondent was ordered to pay for claimant's outstanding medical bills incurred by claimant as a result of his injury, claimant's out-of-pocket expenses as listed in Claimant's Exhibit 4 to the preliminary hearing, claimant's medical mileage as listed in Claimant's Exhibit 3 to the preliminary hearing, and temporary total disability compensation beginning September 14, 2006, and continuing until further order of the court, until claimant is released to return to substantial gainful employment, or until claimant is released with temporary work restrictions which respondent is willing to accommodate. The ALJ also appointed Dr. Jacques Blackman as claimant's authorized treating physician.

[1] Form. K-WC E-1 Application for Hearing (filed Nov. 2, 2006).

Respondent argues that claimant failed to prove by a preponderance of the evidence that he sustained an accidental injury arising out of and in the course of his employment. Respondent further argues that if the Board finds that claimant did sustain an accidental injury arising out of and in the course of his employment, it should find the ALJ erred in determining the date of accident to be September 13, 2006. Respondent also contends that claimant did not timely notify respondent of an injury or file a timely written claim for compensation. Respondent next asserts that the ALJ erred in ordering payment of claimant's unauthorized medical bills, medical mileage reimbursement, and out-of-pocket expenses.

Claimant argues that the ALJ's order finding that claimant suffered an accidental injury arising out of and in the course of his employment should be affirmed. Claimant also argues that the ALJ correctly found that claimant's date of accident was his last day of work for respondent. Claimant contends he gave respondent timely notice and timely written claim of his accident. Relative to the matter of claimant's medical bills, medical mileage, and out-of-pocket expenses, claimant argues that this is not an issue that the Board has jurisdiction to address at this time.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

Respondent is a wholesale distributor of solid flooring, and claimant was employed by respondent as a sales representative. Claimant sold products of ceramic, wood and laminate. He also put up and tore down product displays. Claimant would be on the road three or four days a week. He drove his personal van, into which he loaded his samples. He testified that the samples weighed from 35 to 40 pounds, and some boxes of samples weighted from 75 to 100 pounds. He loaded his van on Mondays, and it would take him an hour to an hour and a half to load the samples into his van. When he visited a customer, he would update their samples, which required him to physically carry samples from his van into the store. In doing this, he would have to pull samples out and move things around in his van.

Claimant testified that sometime between April and June 2004, he was packing and taking apart some displays and stacking the samples. Claimant lifted the samples to take out to a truck when he felt a pop in his back just above his belt line, which he said was painful. He was unable to continue loading the truck after he felt the pop in his back. He told a supervisor, David Self, that he had hurt his back about a week after the incident.[2] Mr. Self did not ask him to fill out an accident form, nor did he offer to send claimant to the doctor. Claimant said that within a couple of days, his back no longer hurt. However, two

[2] West Depo. at 29.

weeks later, he started having problems again. His neck was stiff, and he attributed the stiffness with the amount of driving he was required to do as part of his job. His low back pain began again in conjunction with his neck pain.

Claimant's back condition continued to worsen, and on July 10, 2004, he went on his own to Immediate Care at the Wichita Clinic, where he was seen by Dr. Thomas Peters. Dr. Peters diagnosed claimant with neck pain and recommended he follow up with his personal physician, Dr. Blackman. Dr. Peter's medical note of July 10, 2004, states: "[Claimant] apparently drives a car a lot and sits with his head in one position for hours, and that is probably the root of the problem."[3] Claimant followed up with Dr. Blackman, who ordered x-rays and MRI's of claimant's lumbar, thoracic and cervical spine. The MRI's were performed on September 13, 2004. Claimant was also sent to Dr. Amitabh Goel for pain management. Dr. Goel performed several procedures, including epidural steroid injections, trigger point injections, medial branch block, facet joint injections, and radiofrequency ablations. Dr. Blackman sent claimant to Dr. Earl Mills for a neurology consultation on October 15, 2004. Claimant reported to Dr. Mills that "his symptoms began approximately four and a half months ago, while lifting samples at work and while in the process of doing so, he felt a pop in his lower back."[4] Dr. Mills eventually recommended a cervical diskography. Claimant turned all his medical bills to his personal health insurance carrier.

Claimant testified that he did not talk to anyone at respondent about reporting an accident or requesting medical treatment before he went to Immediate Care for treatment. He said that he felt it was a coincidence that his low back and neck pain started soon after the pop he felt in his back while loading samples into a truck. When the pain returned after a couple of weeks, claimant said that everything he did at work made the pain worse, including driving and lifting samples. There was finally a time when claimant could not work even with taking his pain medication. About that time, respondent started accommodating claimant at work by sending a coworker with him to help with displays. One time, Dennis Treffer, general manager of respondent, went with claimant and helped him with displays. Another time Mr. Self went with him to help. Respondent also told claimant to hire someone to help him with his work when he was in Wichita and told him he would be reimbursed for that expense. However, claimant was told if he hired help when he was out on the road, the expense would be out of his own pocket. Sometimes when he was on the road, his customers would help him because they knew he was having back pain. Claimant testified that he received some accommodations from respondent in late 2004 but he could give no specific dates.

Claimant said he first started thinking that his problems were related to his job after MRI's were taken in September 2004 that showed he had degenerative back disease and

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[3] P.H. Trans. (Jan. 4, 2007), Cl. Ex. 2 at 66.

[4] *Id*. at 19.

disc protrusions in his neck. Claimant said that he told Mr. Treffer that he had a work-related injury and asked what he could do about it. Claimant said that Mr. Treffer told him that it would not be a good idea to file a workers compensation claim, stating that claimant was past the ten-day limit for filing a claim. Claimant could not remember when this conversation took place. Claimant stated that although respondent knew he was having problems with his neck and back, they did not suggest he file a written workers compensation claim, nor did they offer to pay for his medical treatment under workers compensation. The first time claimant gave respondent written notice of a work injury was October 6, 2006. Before that time, he had never told respondent he needed to file a workers compensation claim, nor did he ask respondent to provide him with medical treatment. He testified that he did not want to cause a fuss with workers compensation because he was afraid of losing his job.[5] He said that he thought he could have his back and neck pain problems taken care of without having the aggravation of going through workers compensation.

Claimant is also making a claim for injuries to his knees. He testified that he needed to be on his knees when he would set up and tear down displays. He said that he was having a hard time getting up and down from his knees because of stiffness, cracking and popping. At times, his right knee would give out on him. At the time of the preliminary hearing, claimant had not had any medical treatment for his knees.

Claimant had a morphine pump implanted in his back on September 14, 2006. Even with the pump, he says he has pain that he characterizes as a 4 on a scale of 1 to 10. He has been given permanent restrictions of no lifting over 20 pounds, limited twisting and bending. He can drive but needs to get out of the vehicle every hour to hour and a half to stretch and take breaks. This restriction also applies to sitting for great lengths of time.

After claimant's September 2006 surgery, he continued to work for respondent, taking phone calls from customers. He was not compensated for any sales he made after his return to work after the morphine pump was implanted in his back, and the last day he was paid for working was September 13, 2006. On October 19, 2006, he was told by respondent's owner to stop taking the calls from his customers. As far as he knows, he is still on medical leave from respondent.

Mr. Treffer, the field sales manager at respondent and claimant's supervisor, testified that as part of his job, from time to time he would travel with the sales representatives. He testified that claimant had the largest sales territory for respondent. He said that claimant would probably spend about 60 percent of his time driving over the course of a work week. Claimant would also probably spend 25 percent of his time in interaction with customers and 15 percent of his time setting up displays. Mr. Treffer also stated that the heaviest sample claimant would have handled would be in the range of 40 to 50 pounds and that no box of samples would weigh as much as 100 pounds.

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[5] West Depo. at 39-40.

Mr. Treffer admitted that he knew claimant had been having problems with his back and neck for awhile. He testified one time claimant told him that he had just spent a week on the road setting up some displays and his back was stiff. He did not ask claimant to fill out any workers compensation papers at that time and said that another employee was in charge of workers compensation claims at respondent. He did not offer to send claimant to a doctor. He did not recall having a conversation with claimant about whether claimant should turn in his problems with his neck and back as workers compensation claims. He did not recall telling claimant it would not be a good idea to file a workers compensation claim because more than ten days had elapsed since the onset of his symptoms. Finally, he said that claimant did not file a written report of a work-related accident until after his surgery in September 2006.

Concerning claimant's testimony that he was accommodated at his job because of his back and neck problems, Mr. Treffer testified that he rode with claimant on his route the time mentioned by claimant so that he could assist claimant in getting the displays set up in customer's stores quicker than if claimant did it himself. He also said that all respondent's sales representatives were told to hire school-age help to assist in putting up displays, and this was not done solely because of claimant's back problems.

Claimant was evaluated by Dr. Paul Stein on December 20, 2006, at the request of respondent. Claimant told Dr. Stein that he was lifting ceramic samples in a bent over position when he felt a pop in his low back, followed by low back soreness. He felt better the next day. About a month later, he was driving to Oklahoma when he developed a persistent stiffness in his neck. About a week after that, his low back started aching again.

Commenting on causation of claimant's current condition, Dr. Stein indicated:

> There is no history of a specific accident or injury at work to explain the severe cervical spine symptomatology of which he complained. The incident in June of 2004 was related to the lower back and was relatively short lived. The question is whether or not Mr. West's occupational activities over the last 10 years caused or contributed to his degenerative disk disease in the cervical spine. The only information I have regarding his work activity is that provided by the patient. He indicated very extensive driving, setting up of many displays, and carrying a lot of display material on his head. In my experience, this is not the type of occupational activity which causes cervical degenerative change, which usually involves repetitive hours of overhead activity on a daily basis over a long period of time. The activity described by Mr. West may have caused some muscular and ligamentous discomfort but I cannot state, within a reasonable degree of medical probability and certainty, that this activity caused or significantly accelerated the degenerative disk disease.[6]

[6] P.H. Trans., Resp. Ex. 1 at 8.

The ALJ determined that claimant suffered a series of accidents "as the result of the repetitive work activities he performed for respondent beginning in June of 2004 and continued performing up to the last day he worked for respondent on September 13, 2006."[7] Respondent argues that "there is no evidence that claimant's current complaints are causally related to his employment or for that matter that the claimant performed injurious repetitive activities of any kind."[8] Instead, respondent argues that claimant suffered a specific injury to his back in June 2004 which he did not report as work related. Those symptoms went away the next day. Although claimant experienced pain again two or three weeks later, claimant did not associate those symptoms with work and did not report them as work related. He sought treatment on his own. Respondent contends that claimant has provided "no medical evidence that his pre-existing degenerative back and neck conditions were caused, aggravated or accelerated by his work. Likewise, he provides no evidence whatsoever that any alleged knee condition is related to his employment."[9]

K.S.A. 44-520 provides:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

In addition to the above notice statute, K.S.A. 44-520a requires that a written claim for compensation must be served upon the employer within 200 days after the date of the accident.

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[7] ALJ Order (filed Jan. 31, 2007) at 1.

[8] Respondent's Brief to Appeals Board, (filed Feb. 23, 2007) at 3.

[9] *Id.*, at 6.

Before a determination can be made on the timeliness of claimant's notice and written claim, it must first be determined what claimant's date of accident is for purposes of this claim. This is an alleged repetitive trauma injury. The date of accident in this case is not necessarily the last day worked as has, up to this point, been determined by a long line of cases.[10]

K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

In this case, claimant was neither taken off work, nor restricted from performing the work which caused his condition by an authorized physician. He sought medical treatment on his own. Respondent never authorized medical treatment.

Even though claimant knew he injured his neck and back before his last day of work, as he sought out treatment, the statute's language makes no mention of the date of accident being tied to a claimant's realization as to the cause of his problems. To the contrary, the language of the statute makes it clear under these facts that claimant's accident is not deemed to have occurred until written notice was given to respondent. And

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[10] *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003); *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994); .

that date was on or about October 6, 2006. Although there is evidence to suggest that some of the physicians who saw claimant were given a history of a work-related injury, those physicians were neither authorized nor did they make that finding themselves as a definitive diagnoses. Also, although certain records indicate the injury was possibly caused by work activities, there is no indication when or if that fact was communicated to claimant in writing. Based upon the new version of the statute, this member finds that September 13, 2006, is claimant's date of accident, at least for purposes of providing timely notice and written claim.

Although claimant has a history of low back problems which included surgery in 1985, his current neck and low back symptoms began sometime between April and June 2004. He reported this to David Self, a supervisor, soon thereafter. His knee symptoms are of more recent onset. Claimant attributes all his symptoms to a series of accidents while performing his normal job duties. However, he points to certain identifiable activities as being the most significant with regard to each body part that is injured or symptomatic: As to the mid and low back, it is lifting and driving; as to the neck it is driving; and as to the knees, it is from kneeling while assembling or disassembling displays and samples. Claimant received some accommodations at work beginning in the fall of 2004 in the form of persons to assist with some of the heavy lifting, but this was sporadic, as help was not always available. All of claimant's conditions continued to worsen to the point where he was ultimately unable to continue working. Claimant's last day of work was September 13, 2006. Prior to that date, claimant had given notice of accident to both Mr. Self and Mr. Treffer, who are both supervisors. Written claim was made in October 2006, and an Application for Hearing was filed and served on respondent in November 2006. Accordingly, based upon an accident date of September 13, 2006, both notice and written claim were timely made.

Finally, based upon the record presented to date, this Board Member finds claimant has proven he suffered personal injuries to his neck, back and knees by a series of accidents that arose out of and in the course of his employment with respondent. Respondent is correct that the medical evidence as to the cause of claimant's conditions is not consistent and the record lacks an expert medical opinion relating claimant's knee symptoms to his work. But medical evidence is not essential to establish that an injury is work related.[11] Claimant's testimony alone is sufficient evidence to establish his own physical condition and the existence, nature, and extent of the injury.[12]

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[11] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[12] *Graff v. Trans World Airlines*, 267 Kan. 854, 864, 983 P.2d 258 (1999); *Hardman v. City of Iola*, 219 Kan. 840, 549 P.2d 1013 (1976); *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[14]

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated January 31, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2007.

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BOARD MEMBER

c: Terry J. Torline, Attorney for Claimant
Jason J. Montgomery, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

[13] K.S.A. 44-534a.

[14] K.S.A. 2006 Supp. 44-555c(k).